UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BMW MANUFACTURING CO.

and **Case 10-CA-178112**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

James D. Fagan, Jr.
Stanford, Fagan
2540 Lakewood Ave. SW
Atlanta, GA 30315
Telephone: (404) 897-1000
E-Mail: jfagan@sfglawyers.com

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I. INTRODUCTION

This case is before the National Labor Relations Board based on a Complaint alleging that BMW Manufacturing Co. at its Spartanburg, South Carolina automobile manufacturing facility (Respondent or Employer) violated Section 8(a)(1) of the National Labor Relations Act by unlawfully interrogating employees, discriminatorily prohibiting employees from talking about union matters during working time, and creating the impression of unlawful surveillance. The Complaint also alleges that the Employer violated Section 8(a)(1) by maintaining six overly broad and coercive work rules.

By decision dated December 1, 2017, Administrative Law Judge Donna N. Dawson concluded that the Employer violated the Act as alleged in the Complaint. (ALJD 30-31). The Judge in part ordered the Employer to cease and desist from such unlawful activities, to rescind or modify the unlawful work rules and to post a remedial notice. (ALJD 32-33). Following Judge Dawson's decision, on December 28, 2017, the Employer filed timely Exceptions wherein it argues that Judge Dawson's decision is erroneous. Charging Party, International Union UAW in accordance with Section 102.46 of the Board's Rules and Regulations, respectfully files this answering brief, and for the following reasons submits that Respondent's Exceptions are without merit.

II. RESPONDENT'S EXCEPTIONS

Respondent's Exceptions to the Administrative Law Judge's Decision and its Supporting Brief raise the following areas of inquiry: (1) Whether Judge Dawson erred in finding that Respondent unlawfully interrogated one or more BMW employees on April 4, 2016; (2) Whether Judge Dawson erred in finding that Respondent, on April 4, 2016, discriminatorily prohibited one or more employees from talking about the Union, but not other non-work subjects during work time; (3) Whether Judge Dawson Erred in finding that the Employer unlawfully created the impression of surveillance; (4) Whether Judge Dawson erred in finding that the Respondent violated Section

8(a)(1) of the Act by maintaining six overly broad and coercive work rules. For the reasons discussed below, Respondent's Exceptions are without merit and Charging Party requests the Board to affirm Judge Dawson's findings and conclusions.

A. Respondent Unlawfully Interrogated Employees on April 4, 2016

Respondent argues in its Exceptions Brief that Judge Dawson erred in finding that BMW, by Section Leader Roger Youngblood, unlawfully interrogated hourly workers Johnnie Gill and two of his co-workers on April 4, 2016, in violation of Section 8(a)(1) of the Act because she failed to properly apply the tests identified in *Westwood Healthcare Center*, 330 NLRB 935, 939 (2000) (citing *Rossmore House*, 269 NLRB 1176 (1984) and *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). *See* Brief pp. 43-46. For the reasons detailed below, Respondent's assertions with regard to this issue are devoid of merit.

1. Facts

The situation which is involved in this interrogation incident took place on April 4, 2016. (Tr. 22). Counsel for the General Counsel called three hourly employee witnesses in support of this allegation: Johnnie Gill, Ricky Deese and Jason Evans. As found by the Judge, their testimony is consistent as to what took place in most material respects. (ALJD 4,5; Tr. 19-34; 61-78; 90-101).

All three of the witnesses testified that on April 4, 2016 they were together talking on the production floor during work time and Section Leader Roger Youngblood accompanied by Section Leader Stacy Wright came up to them. (ALJD 5; Tr. 29, 30, 65, 66, 93, 94). The witnesses testified that Youngblood told them: "Give me those papers." *Id.* The three witnesses testified that Youngblood repeated this statement to them three times. (Tr. 32, 66, 94).

According to Jason Evans, Section Leader Youngblood was red faced and yelling when he made these comments to them. (ALJD 4; Tr. 96).

Ricky Deese responded to Youngblood by asking him: "What papers?" (Tr. 32, 66, 94). According to Johnnie Gill, Youngblood told them: "You know what papers I am talking about. Give me those papers. " (Tr. 26). According to Gill, Section Leader Youngblood asked Ricky Deese, "did he give you those papers?" and Deese told Youngblood that he did not know what papers he was talking about. (Tr. 26).

Youngblood told Gill that he had three workers call him and tell him that Gill was talking about the Union on the floor during work hours and he was sick and tired of this.[1] (Tr. 26, 32). Youngblood then told Gill to come with him. (Tr. 32-33). They went to the BMW Human Resources Offices. *Id.*

According to Gill, in the Human Resources Offices Youngblood told him a number of times that he kept getting calls concerning him and he was sick and tired of this. (ALJD 4; Tr. 27). Youngblood also told Gill that he could not talk about the Union on the floor during work time. (ALJD 9; Tr. 26, 32, 44, 45, 50).

It is the Union's position that as found by the Judge, Youngblood's statements and actions were coercive and unlawful. (ALJD 8). Under established Board law, it is an 8(a)(1) violation for management to confiscate or attempt to confiscate union literature, petitions or authorization cards. *See G.C. Murphy Co.*, 213 NLRB 175, 176-177 (1974) (store manager unlawfully

[1] Gill testified that when he arrived at work that morning at approximately 6:30 a.m., while he was in the break room prior to the start of work, that he made an announcement that he had the union papers with him and he asked out loud if anyone wanted "to sign up." (Tr. 23). According to Gill, a worker named Anthony Lyles commented to him that all the union wants is your money. (Tr. 23). Gill testified that he clocked in at 6:35 a.m., went to work, and this discussion took place before his scheduled start time. *Id.*

interrogated employees by among other things asking employees to turn over union flyers to the managers); *St. Frances Medical Center*, 340 NLRB 1370, 1382 (2003) (hospital security guards unlawfully interrogated employees by asking them to turn over to them union literature). Indeed, the Board has held that an employer has no legitimate basis for confiscating or attempting to confiscate union literature even in a situation where it has a valid no-distribution rule and the rule has been violated. *See NCR Corporation*, 313 NLRB 574 (1993). In such a situation, the employer can enforce its rule but it has no legitimate basis for confiscating or attempting to confiscate union literature.

Here, Section Leader Youngblood demanded three times that the workers turn over the papers to him. (ALJD 8; Tr. 32). According to Gill, Youngblood even asked Deese if he [Gill] had given the papers to him [Deese]. (Tr. 32-33). Youngblood was clearly attempting to confiscate the union literature and he interrogated them about which one had it. The law is clear that management does not have the right to demand a worker to turn over union literature to it even if the Employer's non-distribution rules has been violated. The cases cited above establish that such a demand is coercive and constitutes unlawful interrogation.

Further compounding the coercive nature of this incident is the fact that Youngblood unlawfully instructed Gill not to talk about the Union on the work floor during work time. (Tr. 26, 32, 44, 45, 50). The evidence shows that BMW has consistently permitted its employees to engage in conversation concerning any and all matters on the work floor during work time. (Tr. 67-70; 98-100). However, Gill was berated by Supervisor Youngblood for talking about the Union during work time on the work floor. There are legions of Board decisions holding that an employer violates the Act when employees are forbidden from discussing the union during work time but are free to discuss other subjects unrelated to work during work time. *Jenson*

Enterprises, 339 NLRB 877, 878 (2003); *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). This additional unlawful conduct on the part of Youngblood only adds to the coercive nature of his demands associated with the "papers".

Youngblood's denials that he asked the workers for "the papers" are not credible. [2] (Tr. 444). The three union witnesses credibly testified that Youngblood made such statements to them and the Judge correctly credited their testimony. (ALJD 4-6; Tr. 29, 30, 65, 66, 93, 94).

Both Ricky Deese and Jason Evans testified that following this incident Youngblood apologized for the way he acted. (ALJD 4; Tr. 72, 73, 74, 97, 98). Based on Youngblood's explanation at the hearing as to what took place, there was no reason for him to apologize. (Tr. 442, 444, 452). Youngblood's denials are not supported by the credible evidence.

The testimony of Section Leader Stacy Wright in no way supports Youngblood's denials that he demanded the workers to turn over "the papers". Indeed, Wright testified that he was asked by Youngblood to accompany him when he spoke to Gill so he would have a witness as to their conversation. (Tr. 426-427). Wright was with Youngblood when he approached Gill on the production floor. (Tr. 427). Even though Wright had been instructed to act as a witness by Youngblood as to his conversation with Gill, Wright testified that he could not hear what was said by Youngblood to Gill on the production floor. (Tr. 427, 428, 438). It is submitted that the reason that Wright did not hear what was said is because he was well aware that what

[2] Youngblood testified that he walked up to the three workers and they were grouped together talking and had a personal phone out. (Tr. 442). He testified that he told them that they needed to go back to their respective bays because they were not in areas where they should have been. (Tr. 442-444). Youngblood testified that he had no other encounter with these three workers when they were together. (Tr. 445). To accept his version of this incident would mean that all three workers flat out lied. The workers gave detailed testimonies as to what took place. Youngblood's assertion that he went up to them because of the personal cell phone does not ring true and the Judge properly discredited his testimony. (ALJD 5).

Youngblood told Gill and Gill's two co-workers was unlawful. Wright's assertion that he could not hear what was said was a convenient way to avoid having to contradict his fellow supervisor.

The three employees who were encountered by Youngblood had no problem hearing what was said. They were consistent in their testimony that Youngblood demanded that Gill give him the papers. (Tr. 29, 30, 65, 66, 93-96). The Union submits that their testimony was properly credited by the Administrative Law Judge. (ALJD 6).

The Employer in its Brief in Support of its Exceptions asserts that to have unlawful interrogation there must be "questioning related to that employee's union activity or the union activity of others." Brief p. 45. The Employer asserts that there was no such questioning in this situation.

The credited evidence shows the contrary. Indeed, all three workers testified that Youngblood told them: "Give me those papers." (Tr. 29, 30, 65, 66, 93,94). Moreover, according to Gill, Youngblood asked Ricky Deese "did he give you those papers?" (Tr. 26). Deese told Youngblood that he did not know what papers he was talking about. (Tr. 26). Thus, there was questioning involved in this situation. Youngblood interrogated these workers concerning their activities associated with this union petition. Judge Dawson credited these three workers' testimony and rejected the testimony of Respondent's witnesses as to this conversation. (ALJD 4-6).

In determining whether Youngblood's questioning of Gill, Deese and Evans violated the Act, Judge Dawson correctly applied *Rossmore House* and *Bourne*, supra. In doing so, she properly assessed the factors identified in those cases to determine whether Youngblood's conduct on April 4, 2016 violated the Act. (ALJD 7-8). In determining whether an interrogation

violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. (ALJD 7); *Emery Worldwide*, 309 NLRB 185, 186 (1992). As the Judge wrote, the Board will look at factors including whether the employer has a history of hostility of discrimination concerning employee rights; the nature of the information sought; the identify and organizational level of the questioner; the place and method of the interrogation; and the truthfulness of the reply. (ALJD 7-8); See *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). Contrary to Respondent's Exceptions, a balancing of those factors supports Judge Dawson's finding that Youngblood's questioning of these three workers was violative of the Act.

First, the papers which Youngblood demanded to see would reveal the names of employees who signed the union petitions. This information sought by Youngblood strikes at the heart of Section 7 activity and clearly reveals the union sentiments of workers who signed the petitions. Such questioning, concerning the union sentiments of other employees is a well established unlawful interrogation. *Gardner Engineering*, 313 NLRB 755 (1994). The Board has found interrogation unlawful where an employee is questioned about other employees' union sympathies even where the employee asked is an open union supporter, and the questioner is a low-level supervisor. *Cumberland Farms*, 307 NLRB 1479 (1992).

Further compounding the coercive nature of this interrogation is the fact that almost contemporaneous with this interrogation, Youngblood unlawfully told Gill that he was not to conduct union business, including oral solicitation of union participation, during work time. (ALJD 9). The evidence is undisputed that BMW workers were free to talk about anything else during their work time. (ALJD 9). The case law is well established that such discrimination is an 8(a)(1) violation. *See Fresh & Easy Neighborhood Market Inc.*, 356 NLRB 588, 591 (2011).

The Board has specifically held that where an interrogation is accompanied by threats or other violations of Section 8(a)(1) as this one was, there can be no question as to the coercive effect of the inquiry. *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000); *Seton Co.*, 332 NLRB 979, 981-982 (2000); *EDP Medical Computer Systems*, 284 NHLRB 1232, 1264-1265 (1987). Based on the forgoing, it is submitted that Judge Dawson's finding that this incident constituted unlawful interrogation in violation of Section 8(a)(1) of the Act is based on the record evidence and is consistent with established Board law.

B. Respondent Unlawfully Restricted Union Solicitation and Talk About the Union

Judge Dawson found that BMW associates were allowed to talk about non-work subjects during downtime while waiting for work or a part or while working near each other. (ALJD 9). The overwhelming evidence shows that BMW section leaders and managers were aware of this activity on the part of workers and even joined during work time non-work related conversations. (ALJD 9; Tr. 33-34; 67-70, 98-100). The Judge further concluded that on April 4, 2016 Respondent, through Section Leader Roger Youngblood, advised Union supporter Johnnie Gill not to conduct union business including oral solicitation of union participation during work time. (ALJD 9); Tr. 26, 32, 44, 45, 50).

The Judge's conclusion that this discriminatory restriction on Union speech and solicitation violated the Act is entirely consistent with well established law. *Jenson Enterprises*, 339 NLRB 877, 878 (2003); *Williamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986).

The Employer in its Exceptions Brief asserts that on April 4, 2016 Youngblood was merely investigating a complaint by another worker and he determined that no disciplinary

action was warranted. (Brief p. 47). According to BMW, under the circumstances this conduct on the part of Section Leader Youngblood did not interfere with any employee's protected activities. *Id*.

The problem with BMW's assertion in its Exceptions Brief is that Section Leader Youngblood did not just investigate a complaint on April 4, 2016. In the beginning of this so-call investigation, he demanded Gill and the two other workers turn over "the papers", presumably Union authorization petitions or cards, to him and then carried Gill into the Human Resources Office and intimidated Gill for talking about the Union and/or soliciting participation for the Union on the work floor during work time. That conduct cannot be fairly characterized as merely an investigation of a complaint. The Judge found that in the Human Resources Office Youngblood told Gill not to conduct union business, including oral solicitation of union participation during work time. (ALJD 9). Under all of the attendant circumstances including the fact that BMW workers were allowed to talk about non-work subjects during work time, Youngblood's directive to Gill on April 4, 2016 was unlawful and violative of Section 8(a)(1) of the Act. This action on the part of Youngblood was much more than an investigation. It was an unlawful interrogation and an unlawful directive to Gill not to conduct union business, including oral solicitation of union participation, during work time. Both of these actions on the part of Section Leader Youngblood violated Section 8(a)(1) of the Act and Judge Dawson was correct in so finding.

C. BMW Unlawfully Created The Impression of Surveillance

Judge Dawson found that on two occasions BMW supervisors or managers unlawfully created the impression that employees' Union activities were under surveillance by telling employees that managers and supervisors had accessed and/or were accessing the employees'

private, restricted, pro-Union Facebook page, "The Car Mill". (ALJD 17, 20). It is the Union's position that Judge Dawson's findings in this regard are entirely consistent with the record evidence and established law.

An employer creates an unlawful impression of surveillance if its employees "would reasonably assume from the statements in question that their union activities had been placed under surveillance." *Heartshare Human Services of New York*, 339 NLRB 842, 844 (2003). "The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in a union organizing campaign without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

In *Purple Communications*, 361 NLRB No. 127 slip op. 15-16 (2014) the Board set out specific and detailed rules concerning employers and workers' rights associated with the internet and/or email systems. More specifically, the Board stated that its decision in that case did not prevent employers from "continuing as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability", and it also stated that employers are not ordinarily prevented from notifying employees that they monitor computer and email use for legitimate management reasons such that employees have no expectation of privacy in their use of the employer's email systems. *Id.* However, the Board also stated that allegations of surveillance of protected activities would continue to be assessed using the same standards applied "in the brick-and-mortar world", explaining:

> Board law established that "those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary.'" An employer's monitoring of electronic communications on its email system will similarly be lawful as long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.

It is clear from the decision in *Purple Communications* that an employer engages in unlawful surveillance by going into or accessing a private, restricted, pro-union Facebook page and viewing the information and comments posted by workers on the Facebook page or trying to create the impression that it is closely monitoring workers' activities on such Facebook pages. Such conduct involves an employer engaging in conduct "out of the ordinary" and is unlawful.

The first incident of unlawful creation of the impression of surveillance arose during a telephone conversation in early May 2016 between Assembly worker Dean Lawter and A Shift Human Resources Manager Corey Epps. G.C. Exhibit 4 is a copy of an email dated May 4, 2016 in which Lawter emailed Epps requesting that Epps call him and this email resulted in Epps calling Lawter. (ALJD 10, 17; Tr. 112-113). According to Lawter, during this call he advised H.R. Manager Epps that he wanted to apply for a safety job but he was prohibited from doing so because of a two year commitment that he was under to remain in his current position. (ALJD 10; Tr. 114-117).

Lawter testified that during the conversation that he asked Epps: "Ya'll know why morale is so low" and Epps responded that they knew why morale was low. Epps then told Lawter "Don't you think that managers have seen the Facebook page The Car Mill?". (ALJD 10; Tr. 117).

Lawter testified that he told Epps that he was sure "ya'll [had] seen it" but if we find anybody in there that [should not be] that we'll kick them out because it is a secret group. (ALJD 10). According to Lawter, he also told Epps that The Car Mill is not open to the public and someone can't just get on Facebook, do a search for The Car Mill and find it. *Id.* He further explained to Epps that to participate in this Facebook page, that person must be invited. (Tr. 117). *Id.*

At the hearing, Epps denied making any comment about the Facebook page to Lawter. (Tr. 481). He testified that he had never been on Facebook. (Tr. 488).

The Union submits that the testimony of Dean Lawter was correctly credited by Judge Dawson. (ALJD 10). His testimony was entirely consistent with his NLRB affidavit. Lawter did not try to embellish the incident in any way. His testimony was straight forward and direct. Moreover, it is not relevant whether or not Epps was a Facebook participant. His statement to Lawter was that "managers" had seen the Facebook page not that he had seen it. Epps clearly conveyed the impression that BMW management was going online and viewing the secret, restricted access Facebook page, not necessarily Epps himself.

This statement was clearly intended to put this union supporter on notice that management was closely monitoring union support among the workers, workers' morale and the workers' protected, concerted activities. Management had to do "something out of the ordinary" to access this Facebook page since it was not open to the public and subject to strict controls. (Tr. 143). Under *Purple Communications*, it was clearly unlawful for supervisors and managers to access and view this secret Facebook page and to then tell this worker about this unlawful action.

Based on the foregoing, the Union submits that Judge Dawson correctly found that Human Resources Manager Epps violated Section 8(a)(1) of the Act by advising Dean Lawter that managers have seen the secret pro-union Facebook page. (ALJD 17). By such conduct Epps created the impression that the BMW employees' secret Union activities were under surveillance by management. *Id.*

This very same theme was carried forward in an incident between Section Manager Chris Kirby and BMW worker Willie Pearson. On May 5, 2016, during down time, Section Manager Chris Kirby held a meeting with the workers in the Tilt area in which Willie Pearson works. (ALJD 11; Tr. 153, 154, 159). During that meeting, there was a commotion caused by an unsafe condition which took place and Willie Pearson interrupted the meeting to warn a co-worker of the danger. (Tr. 161-162). Section Manager Kirby scolded Pearson for interrupting the meeting and Pearson took offense at the manner in which Kirby spoke to him in the meeting in front of his co-workers. (ALJD 11; Tr. 162).

Thereafter, Willie Pearson asked for a meeting with Section Manager Kirby to complain about the manner in which Kirby had spoken to him in front of his co-workers. (Tr. 189). When Pearson met with Section Manager Kirby, Pearson told Kirby that he felt Kirby had "disrespected" him during the earlier meeting. (ALJD 11; Tr. 164, 165). During this conversation, which quickly turned to the subject of the Union, Section Manager Kirby told Pearson that the UAW does not do anything but teach the workers to tell lies. (Tr. 165). In response to this statement, Pearson asked Kirby what did he mean. Kirby told him: "Like the Facebook page that you guys got, The Car Mill. Ya'll spread lies." You and the rest of the administrators on that Car Mill "don't do nothing but spread lies." (ALJD 12; Tr. 166).

Kirby told Pearson: "I saw what ya'll, you and your administrators, put on there, put on The Car Mill, about Rich Morris." Kirby told Pearson that Rich Morris' wife and kids saw it and she called Rich in Germany about the Facebook posting associated with Morris[3]. (ALJD 12; Tr. 167).

During this conversation, Kirby also mentioned to Pearson about a photograph of Pearson holding a Union Yes sign and bullhorn (G.C. Ex. 3) which appears on The Car Mill Facebook page and that Pearson was one of the Administrators of the Facebook page. (Tr. 166, 168, 169). Kirby also commented to Pearson about one of the other Administrators on the Facebook page who is also a BMW worker supervised by Kirby. (Tr. 167). Kirby told Pearson that this worker was not suited to be an Administrator on the Facebook page because he never came to work. (ALJD 12; Tr. 167). Kirby repeatedly drove "home" the point to Pearson that management was well aware of what was posted on this secret Facebook page. (Tr. 166-169).

In his email to UAW organizer Brad Bingham, Pearson succinctly described Kirby's conduct during this conversation as follows: "he was trying to intimidate me by letting me know he knows all of our pro-union moves." (G.C. Ex. 2 p.2).

This comment by Pearson clearly shows what took place during this conversation. Kirby's conduct and statements were intended to let Pearson know that BMW management was closely monitoring the pro-union activities of the BMW workers. Kirby's statements were clearly aimed at chilling this union activist's support for the Union.

As discussed above, the Board has clearly stated that those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when

[3] Allegedly, Morris had been terminated for misappropriating funds. (Tr. 191).

management observes them engaging in public union activity so long as management does not "do something out of the ordinary."

Here, Section Manager Kirby, by his statements to Pearson, was clearly telling Pearson that management had done something "out of the ordinary", and management had and was accessing the protected and secret Facebook page or was closely monitoring that Facebook page. Kirby made it clear to Pearson by his detailed references concerning the particular postings, leaders, and participants on this Facebook page that The Car Mill was under the watchful eye of BMW management.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statements in question that his or her union activities had been placed under surveillance. *United Charter Service,* 306 NLRB 150, 151 (1992). "The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means". *Id.* at 151. "The idea behind the finding of an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries,* 311 NLRB 257 (1993).

The Board has specifically held that where a supervisor's statement "reasonably suggested . . . that the Respondent was closely monitoring the degree and extent of [the

employees'] organizing activities" that there is an unlawful impression of surveillance created. *United Charter Service,* 306 NLRB 150, 151 (1992). In the *United Charter Service* case the Board stated "even if it were common knowledge that the employees were attempting to organize [the supervisor's] comments went beyond permissible limits. Not only did [the supervisor] tell the employees that he knew of their organizing efforts, he also went into detail about the extent of the activities and the specific topics they discussed at the meetings." It was found in *United Charter Service* that the supervisor's statements reasonably suggested to the employees that the Respondent "was closely monitoring the degree and extent of their organizing efforts and activities".

The Board has in a number of cases found based on the *United Charter Service* analysis that an unlawful impression of surveillance occurs where a supervisor's statements reasonably suggest to the employee(s) that Respondent "was closely monitoring the degree and extent of their organizing efforts and activities". These cases are based on the specifics of the supervisor's statements and the impression that is reasonably created by the degree and extent of the information that management reveals that it has obtained concerning the workers' protected activities. *See Camaco Lorain Manufacturing,* 356 NLRB 1182, 1183-1184 (2011); *Quickway Transportation, Inc.*, 354 NLRB No. 80 slip op. at 1,10-11 (2009).

In the present case, Kirby's statements to Pearson made it absolutely clear that BMW management was closely monitoring the "degree and extent" of the workers' organizing activities associated with their Facebook page, The Car Mill, and under the *United Charter Service* line of cases Kirby's statements unlawfully created the impression of surveillance.

The clear message conveyed by Kirby to Pearson was that management not only knew about the existence of The Car Mill but it also knew in great detail about all aspects and details concerning this Facebook page. Kirby revealed to Pearson that he and BMW management were aware that he was one of the administrators of The Car Mill and that one of the workers supervised by Kirby was also an administrator. (Tr. 166, 167). Kirby described to Pearson in graphic specifics about his photograph which appears on The Car Mill and how he was holding a bullhorn and UAW sign in the photograph. (G.C. Ex. 3; Tr. 168, 169). Kirby revealed to Pearson that he, Morris' wife and her kids had seen the Facebook postings concerning Morris. (Tr. 165, 167). Kirby told Pearson that these comments were lies and Morris should sue the workers due to their lies concerning him. (Tr. 170). Kirby's statements to Pearson concerning The Car Mill went beyond permissible limits. He made it clear to Pearson that BMW management knew who were the participants on this Facebook page and the contents of their comments that they have made on the Facebook page. (Tr. 165-170).

It is UAW's position based on the *United Charter Service* line of cases that Kirby's statements to Pearson constituted an unlawful impression of surveillance. Kirby's comments were clearly calculated to discourage Pearson from posting on this Facebook page and to cause him to use caution in what he said on The Car Mill.

In its Exceptions Brief, BMW asserted that under the Board's decision in *Frontier Telephone of Rochester*, 344 NLRB 1270, 1276 (2005) Kirby's statements to Pearson were lawful and did not create an unlawful impression of surveillance. (Brief 35-36).

In *Frontier Telephone*, during a union organizing drive at Frontier's Rochester, New York call center, an employee shared with a supervisor an online posting from an internet

website used by employees to discuss union issues. 344 NLRB at 1275. Several days later, in response to another employee's question about what the supervisor thought of the organizing drive, the supervisor acknowledged knowing about the website. An employee testified that he was intimidated by this remark because he assumed that the website was inaccessible to management. *Id.* Nonetheless, the Board found that the supervisor did not create an impression of surveillance reasoning that the employees had no basis for believing the website was private and secure, any subscriber to the site could show its contents to anyone else. The Board found that there was no evidence that subscribers were told to maintain its secrecy, and the employees' organizational activities had become public and were generally known . *Id.* at 1276.

It is the Union's position that *Frontier Telephone* is distinguishable from the present case. Here, Willie Pearson was an Administrator on The Car Mill. (Tr. 166). He testified in detail how the Facebook members were selected and that BMW management and salaried personnel were not permitted to participate in the Facebook page. (Tr. 169, 174, 175). More significant, however, is that in the present situation, Kirby's statements to Pearson about The Car Mill were very detailed and specific. The specificity of Kirby's statements concerning the names of the administrators of the Facebook page, the participants thereon, and the contents of the postings on The Car Mill reasonably suggested to Pearson that BMW managers were closely monitoring the degree and extent of the organizing activities on The Car Mill.

In *Camco Lorain Manufacturing*, 356 NLRB 1182, 1183-1184 (2011), the Board specifically distinguished the decision in *Frontier Telephone*, and held that it had no application in that case. *Id.* at 1183. One of the primary reasons for that conclusion by the Board was because of the specificity of the questions by the supervisor to the worker in question. *Id.* at 1183, 1189). The Board in that case recognized that the detailed specifics of the supervisor's

questions conveyed the impression that the workers' union activities were under the watchful eye of management and were coercive. The Board in so holding followed the *United Charter Service* line of cases.

In short, Kirby's statements to Pearson went beyond permissible limits and were coercive. His statements clearly created the impression that BMW management was closely monitoring the degree and extent of the organizing activities on The Car Mill. These statements were detailed and specific and clearly revealed that BMW management was fully aware of all the particulars concerning this secret Facebook page. Therefore, under the *United Charter Service* line of cases Kirby's comments were coercive and violative of Section 8(a)(1) and unlawful. UAW submits that Judge Dawson was correct in so ruling. (ALJD 17).

D. Respondent's Work Rules

BMW by virtue of its Answer and Amended Answer to the Complaint (G.C. Ex. 1(g) and (i)) in this case admitted that since on or about January 8, 2016, it has maintained the following rules:

(a) **Standards of Conduct**

In order to maintain a safe, efficient organization and to promote a spirit of teamwork, certain basic rules of conduct must be followed. These are general standards for behavior and are not all-inclusive. Associates of BMW MC are expected to know, understand, and follow these standards. Any conduct which disrupts safety or normal business activities may result in corrective action up to and including termination of employment.

. . .

Demonstrate respect for the Company.

Not engage in behavior that reflects negatively on the Company.

Not use threatening or offensive language.

Not use personal recording devices within BMW MC facilities and not use business recording devices within BMW MC facilities without prior management approval.

(b) Confidentiality of Information

Because of the highly competitive nature of the automotive industry, the protection of confidential business information and trade secrets is vital to the interests and success of BMW MC. Such

information includes but is not limited to personal and financial information, customer lists, production processes and product research and development.

All BMW MC Associates, suppliers, contractors and third-party vendors must:

- Respect the nature of privileged or confidential information.
- Not use confidential information for personal gain.
- Not share such information with persons internal or external to BMW.

Any information that BMW MC has not released to the general public must be treated as confidential. If an associate has a question about whether certain information should remain confidential, he/she should discuss it with his/her supervisor or a manager.

Violation of these guidelines may result in corrective action up to and including termination of employment.

(c) Solicitation and Distribution

BMW MC prohibits the solicitation, distribution and posting of materials on or at Company premises by any Associate or non-Associate, except as may be permitted by this policy. Associates may not solicit other Associates to join or contribute to any fund, organization, cause, activity or sale during work time and/or in work areas. Work time is that time when Associates are expected to be working and does not include rest, meal, or other authorized breaks. Associates may not distribute literature, including circulars or any other materials, during work time and in any work areas. The posting of materials is only permitted with joint approval by the departments of Associate Relations and Corporate Communications. BMW MC permits appeals for United Way. Human Resources must approve any exceptions to this policy. Solicitation or the distribution of literature or any circulars or material by non-Associates on BMW MC premises is prohibited.

ARGUMENT RELATING TO UNLAWFUL RULES

A. Applicable Standards For Assessing Employer Rules

With respect to work and confidentiality rules, the Board and the courts have held when determining whether the maintenance of such rules violate Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Where the rules are likely to have a chilling effect on Section 7 rights, the maintenance of such rules is an unfair labor practice, even absent evidence of enforcement." *Id.* at 825; *See also Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The Board has held that rules which reasonably chill employees in the exercise of their Section 7 rights are unlawful, regardless of whether the rule was unlawfully motivated or ever enforced. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Further, the Board has held that even "[i]f the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Northeastern Land Services, Ltd.*, 352 NLRB 744 (2009) (applying the Board's standard in *Lutheran Heritage Village-Livonia*, 343 NLRB at 647).

In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board recently addressed its analytical framework for determining whether maintenance of rules violate the Act. In that case, the Board overruled the "reasonably construe" standard in prong one of the *Lutheran Heritage* analytical framework. The Board stated that it "will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." Id. slip op, at 2. Instead, the Board set forth a new standard under which it determined that:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. We emphasize that the Board will conduct this evaluation, consistent with the Board's "duty to strike the proper balance between. . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1). As the result of this balancing. . .the Board will delineate three categories of employment policies, rules and handbook provisions:
>
> *Category I* will include rules that the Board designates as lawful to maintain either because (i) the rule, when reasonably interpreted, does not prohibit or

> interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . .;
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
>
> *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.
> Id. Slip op. 2-3.

In determining whether a rule is unlawful, the Board "focuses on the text of the challenged rule." *Guardsmark v. NLRB*, 475 F.3d 369,374(D.C. Cir. 2007). It "give[s] the work rule a reasonable reading and refrain[s] from reading particular phrases in isolation." *Albertson's, Inc*., 351 NLRB 254, 259 (2007). The analysis is an objective one: "[a]s long as its textual analysis is reasonably defensible, and adequately explained, the Board need not rely on evidence" that employees actually interpreted the rule to prohibit Section 7 activity. *Cintas v. NLRB*, 482 F.3d 463, 467(D.C. Cir. 2007); *accord Flex Frac Logistics, LLC v. NLRB,* 746 F.3d 205, 209(5th Cir. 2014).

Finally, any ambiguity in a work rule is construed against the employer as the rule's promulgator. *Lafayette Park Hotel*, 326 NLRB at 828; *Flex Frac Logistics, LLC,* 358 NLRB No. 127, 2012 WL 3993589, at *2 (2012) ("Board law is settled that ambiguous employer rule are construed against the employer."); see also *NLRB v. Northeastern Land Servs. Ltd*, 645 F.3d 475,483(1st Cir. 2011) (affirming that "the Board's rule is intended to be prophylactic and . . . is subject to deference"). Employees "should not have to decide at their own peril" the lawful contours of their employer's rules. *Flex Frac*, 2012 WL 3993589, at *3 (internal quotation omitted); cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (assessment of whether

employer statements violate Section 8(a)(1) "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

B. Respondent's Rule Requiring Employees to Demonstrate Respect for The Company Unlawfully Interferes with Employees Section 7 Right to Criticize Their Employer

In BMW's Standards of Conduct contained in its Associate Guidebook (G.C. Ex. 5, p.4) there is the rule which provides employees "must demonstrate respect for the Company." (Complaint par.6(a)). BMW by virtue of its Answers to the Complaint has admitted that it has maintained this rule since about January 8, 2016. (G.C. Ex. 1 (g) and (i)).

BMW's rule and requirement in its Standards of Conduct (G.C. Ex. 5 p. 4) that associates must "[d]emonstrate respect for the Company" is overly broad, facially invalid and is so ambiguous as to prohibit Section 7 protected activity. The law is established that employees have the Section 7 right to criticize or protest their employers' labor policies and/or treatment of employees. *NLRB v. Lexington Chair Co.*, 361 F. 2d 2836 (4th Cir. 1966).

Labor disputes and union campaigns frequently involve "controversy, criticism of the employer, arguments, and less-than-positive statements about terms and conditions of employment". *T-Mobile USA, Inc.* 363 NLRB No. 171 slip p. 2 (2016). Such communications are nonetheless protected by the Act, and indeed the proper functioning of the Act requires free and open discussions between employees and management. *See Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 68 (2008); *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966).

Based on the plain language of BMW's rule requiring that associates must "demonstrate respect for the Company", this rule prohibits the act of workers in concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or jointly challenging an unlawful pay scheme-all core Section 7 activities. The rule's plain language

prohibits any and all conduct not deemed respectful without providing any context for employees to discern limitations on this broad command. Such conduct as is proscribed by this rule is squarely within the protections afforded to employees under Section 7 of the Act.

There is no shortage of Board cases where employer rules identical and/or nearly identical to BMW's rule in question have been found to be so ambiguous and overbroad so as to prohibit Section 7 protected activities. *Casino San Pablo*, 361 NLRB No. 148 slip at p. 3 (2014) (employer violated Act by maintaining rule prohibiting insubordination or other "disrespectful conduct"); *Hoot Wing, LLC*, 363 NLRB No. 2, slip op. 21 (2015) (rule unlawful requiring employees to be respectful to Company, other employees or customers); *Teletech Holdings*, 342 NLRB 924, 932 (2004) (supervisor's statements violated Act by urging employees not to criticize their jobs or the employer on the grounds that it is disrespectful to those people who take pride and enjoy working for the employer).

Under the Board's *Boeing* analysis, the rule's legality is based upon whether or not the rule's adverse impact upon NLRA-protected rights is outweighed by the Employer's justifications associated with the rule. *See Boeing, supra* at 16. It is a core Section 7 right that workers must be able to criticize their employers if they are not satisfied with their wages, hours and working conditions. The prohibition of such criticism would totally destroy unions' ability to organize workers. On the other hand, BMW has failed to demonstrate any real justification for this rule as written. BMW in its Exceptions Brief asserted that this rule is applied extremely infrequently and is intended to protect against situations when employees go out into the community and cause damage to the Company's reputation through misrepresentations. (Brief 14).

This rule as written is much broader in scope so as to regulate misrepresentations concerning the Company. Under the *Boeing* analysis, this rule seriously interferes with the BMW workers' Section 7 rights while there is virtually no justification for the rule as written. This is not a rule of "civility" as discussed in *Boeing*. This is a rule which seriously intrudes upon workers' Section 7

rights. The Union submits that under the *Boeing* balancing test this rule is unlawful because the adverse impact on Section 7 rights substantially outweighs any possible justification for the rule. Therefore, the Union submits that Judge Dawson was correct in ruling that this rule violates Sections 8(a)(1) of the Act. (AEJD 22,23).

In *NLRB v. Electrical Workers Local 1229 (Jefferson Standard* Broadcasting, 346 U.S. 464 (1953)), the Court held that employee statements in question in that case were unprotected because they constituted a public disparaging attack *upon the quality of the company's product and were maliciously false*. BMW's rule that associates must "demonstrate respect for the Company" is not so narrowly drawn to only prohibit maliciously false statements that disparage BMW's product. Indeed, this rule is broad enough to encompass statements or conduct protected under the Act and beyond the scope of *Jefferson Standard Broadcasting Co.* holding.

The case law is clear that rules which do not contain language to clearly show that they are aimed only at unprotected activity are overly broad and unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip at 3 (2014). In *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), the Board found an employer's prohibition on the following conduct to be unlawfully overbroad: "Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees." The Board reasoned that the prohibition failed to differentiate between false and maliciously false statements and thus would cause employees to refrain from engaging in protected activity. BMW's rule does not draw such a distinction, is similarly overly broad and therefore unlawfully restricts protected activity.

The case law is established that work rules must be narrowly drawn so as to not unnecessarily intrude upon workers' Section 7 rights. *See Costco Wholesale Corp*., 358 NLRB 1100, 1101(2012) (rule prohibiting comments "that damage the Company, defame any individual or damage any

person's reputation" unlawfully overbroad as it failed to limit its application to permit protected concerted activities).

Based on the above, it is submitted that BMW's rule requiring its associates to demonstrate "respect" for the Company violates Section 8(a)(1) of the Act and it is submitted that the Judge was correct in so ruling. (ALJD 22,23).

C. BMW's "Negativity" Rule Inhibits Employees in the Exercise of Their Section 7 Rights.

It is undisputed that BMW has maintained since January 8, 2016 the rule which requires its associates to "not engage in behavior that reflects negatively on the Company."(Complaint par.7(a); GC Ex. 5, p.4). The evidence establishes that this rule is in BMW's Standards of Conduct and part of its Associate Guidebook. *Id*. It is the Union's position that this rule is so patently ambiguous, imprecise and overbroad that it prohibits conduct protected by Section 7 of the Act.

It is very difficult to envision union organizational activity by pro-union employees which would not involve criticism of the Employer and its rules and policies. Such activity would reflect "negatively on the Company" and is clearly prohibited by the rule in question. Employee criticism made about the employees' working conditions, terms and conditions of employment and treatment by the Employer clearly falls within this rule. This type of conduct is core Section 7 activity. It is the gristmill for organizing.

BMW in this rule does not define "negatively" or what type of behavior is encompassed by this rule and leaves it up to the employees to define these terms for themselves. It is submitted that BMW employees would reasonably construe this rule as prohibiting protected Section 7 activity. *See* also *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999) where the Board found a rule which prohibited using loud, foul or abusive language unlawful because the employer did not define those terms.

Furthermore, the Board has repeatedly held when an unlawful and lawful interpretation may be garnered from the reading of a rule, an employer is liable for the unlawful interpretation. *Nova Southeastern University*, 357 NLRB No.74 slip.20 (2011).

The Board has consistently found that employer rules prohibiting "negative" speech and behavior are unlawful. For example, in *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011), the Board found a rule prohibiting "any type of 'negative energy or attitudes'" to be unlawful. In *Hill & Dales General Hospital*, 360 NLRB No. 70 slip at 2 (2014), the Board found a rule prohibiting "negative comments about fellow team members, engaging in or listening to negativity and requiring employees to represent the Respondent in the community in a positive and professional manner" was overly broad, unlawful and intruded upon the workers' Section 7 rights. In *Claremont Resort & Spa*, 344 NLRB 832(2005), the Board found unlawful a rule that prohibited "negative conversations about associates and/or managers."

In *Pratt Corrugated Logistics*, 360 NLRB No. 48 (2014), the Board held that a non-disparagement provision in a severance agreement was unlawfully overbroad to the extent that it prohibited the former employees from engaging in conduct that disparages, criticizes or otherwise casts a "negative" characterization upon the Company.

BMW in its Exceptions Brief dealing with this rule was hard pressed to come up with an explanation as to why this rule is lawful. It asserts that this policy "is intended to govern management-level employees who represent BMW in the community in some official capacity. (Brief 15). The problem with this assertion is the rule as it reads applies to all BMW associates, not just managers. BMW also asserts that this rule is in place to protect legitimate business interests of the Company in managing its reputation when its representatives go out into the community. (Brief 16). Again, this rule as written is much broader in scope than the stated purpose. As written, the rule directly interferes with BMW workers' core Section 7 rights. BMW could have easily drafted language limited to its managers and it could have drafted language which protected its legitimate

business purposes. This rule goes much further and seriously interferes with the workers' Section 7 rights.

The *Boeing* balancing test clearly tips toward a finding that this rule is unlawful. No legitimate reason has been given by BMW for this rule which is so broad and encompassing in its reach to seriously interfere with Section 7 activity. Picketing, leafleting or communication with the public concerning the working conditions clearly involve conduct which would negatively reflect upon BMW. This rule prohibits such conduct and is totally destructive of the BMW workers' Section 7 rights. Judge Dawson correctly found this rule violative of Section 8(a)(1) of the Act and Charging Party asks the Board to affirm this finding. (ALJD 24).

D. BMW's Rule Prohibiting Offensive Language Unlawfully Interferes with Employees' Section 7 Rights

In BMW's Standards of Conduct contained in its Associate Guidebook (G.C. Ex. 5, p.4) there is the rule which provides employees may "not use threatening or offensive language." (Complaint par.6(a)). BMW by virtue of its Answers to the Complaint has admitted that it has maintained this rule since about January 8, 2016. *Id.*

While the Board has held that employer rules prohibiting threatening language or conduct may be lawful, here BMW's rule also proscribes "offensive language." *See Honda of America Manufacturing, Inc.*, 334 NLRB 746, 747, 748(2001). This terminology or similar terminology in employer rules has repeatedly been found by the Board, courts and ALJs to be facially unlawful. In *Valley Health Systems LLC*, 363 NLRB No. 178, slip op. at 1-2 (2016) the Board found that a rule prohibiting "offensive" conduct to coworkers was unlawfully overbroad and this terminology was sufficiently imprecise to encompass statements or actions protected by Section 7. In *Tenneco Automotive, Inc.*, 357 NLRB 953, 957, 958(2011) enforced in relevant part 716 F. 3d 640 (D.C. Cir. 2013) the requirement that employees refrain from statements "that might be deemed offensive" was determined to violate Section 8(a)(1). The Board in *NCR Corp.*, 313 NLRB 574, 577 (1993) affirmed

an ALJ's finding that an employer's rule against bulletin board posting containing "offensive language" was overly broad and unlawful. *See* also *Insight Global*, 2016 WL6921209(JD-113-16)(slip at pp. 20-21.) (policy which prohibited offensive materials, language and images as well as other inappropriate material is unlawful and interferes with workers' Section 7 rights).

The Board majority in *Casino San Pablo*, 361 NLRB No. 148, slip op. p.3 (2014) found facially unlawful a nearly identical rule which prohibited "insubordination or other disrespectful conduct (including failure to cooperate fully with security, supervisors or manager.)" In that case, the Board majority noted that, although rules solely prohibiting "insubordination" are lawful, the inclusion in the rule of "other disrespectful conduct" encompassed Section 7 activity and was unlawful. *Id.* at p. 3. In that case, the dissenting Board member concluded that the rule was lawful because of the context in which it was written and because it was included in the same rule with insubordination. The dissenting Board member cited the District of Columbia circuit's decision in *Community Hospitals*, 335 F.3d at 1088 in support of his dissent. In rejecting that argument, the Board majority in *Casino San Pablo* concluded that the rule in *Community Hospitals* was squarely focused on insubordinate activity and such was not the case with respect to the rule which prohibited "insubordination or other disrespectful conduct." *Id.* at p. 3.

BMW's rule prohibiting threatening or offensive language is no different than the rule in *Casino San Pablo.* BMW's prohibition against offensive language which is unlawful is combined in the same rule with the prohibition against threatening language which may be lawful. The Board majority in *Casino San Pablo* specifically held that this fact does not render the rule lawful and when read in proper context the rule is unlawful. Here, BMW's rule is not just squarely focused on threatening language; it also prohibits offensive language which is much broader than threatening language. The Board majority in *Casino San Pablo* held that even though an unlawful part of a rule is nestled within a rule which is partially lawful that this inclusion does not render the rule lawful. The

Board majority found that if a rule is unlawfully overbroad on its own, it cannot be saved because it is buffeted by other lawful provisions.

In the present case this broad rule against offensive language prohibits activities protected by Section 7. Respondents' prohibition prohibiting "offensive" language is amorphous and could be deemed to cover a broad range of conduct. A BMW employee cannot be sure what might be considered "inappropriate" language and BMW in its rules offers no guidance either through specific examples or limiting language that would exclude Section 7 activity. The rule prohibiting offensive language encompasses employee criticism of Respondent's labor policies, treatment of employees, or terms and conditions of employment, or complaints about working conditions. The Board has recognized in the cases cited above, that protected activities might be considered offensive, yet they nonetheless retain the protection of the Act.

In short, Board precedent supports the conclusion that BMW's "offensive" language prohibition unlawfully prohibits Section 7 activity and the Union submits that the Administrative Law Judge was correct in so ruling. (ALJD 23-24).

BMW in its Exceptions Brief asserts that the Board's decision in *Boeing* overruled the above cited cases and under *Boeing* this rule is lawful. Brief 18. The problem with the Employer's Exceptions Brief is that it repeatedly refers to the part of this rule which prohibits threatening language. The Judge in her decision acknowledged that a ban on "threatening language" might be lawful. (ALJD 24). The Judge concluded, however, that the part of the rule which taints the rule is the part which prohibits "offensive language". No one challenges the part of the rule relating to threatening language. The Employer in its Exceptions Brief, however, cites to the part of the rule prohibiting threatening language in an attempt to justify the rule.

It is the Union's position that under the balancing test put forth in *Boeing* that part of the rule prohibiting offensive conduct unduly prohibits Section 7 activity. BMW has a legitimate right to preclude workplace violence. The prohibition of threatening language achieves that purpose. The

prohibition of "offensive language" goes beyond the goal and unduly regulates Section 7 activity. The cases discussion Section 7 rights cited above clearly recognize that discussions of labor matters often involve discussions which are controversial in nature and may be offensive to many. These areas involve core Section 7 activities and it is the function of the Act to protect workers in these activities. The part of this rule which prohibits "offensive language" unduly interferes with the Section 7 rights of BMW workers. The Charging Party asks the Board to so rule.

E. BMW's Recording Ban Is Overly Broad and Unlawfully Interferes with Its Employees' Right to Engage in Section 7 Activity

It is undisputed that BMW has maintained since January 8, 2016 the rule which requires BMW associates to "[n]ot use personal recording devices within BMW MC facilities and not use business recording devices within BMW MC facilities without prior management approval."(Complaint par.7(a); GC Ex. 5, p.4). The evidence establishes that this rule is in BMW's Standards of Conduct and part of its Associate Guidebook. *Id*.

The Charging Party contends that this rule is overly broad and seriously intrudes on BMW workers' Section 7 rights. Further, it is the Union's position that the Judge correctly concluded that this rule was unlawful. (ALJD 26). Employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. *See T-Mobile USA, Inc.*, 363 NLRB No. 171 slip at 4-5 (2016);*Rio All-Suites Hotel & Casino, 362 NLRB No 190, slip op. at 4(2015);Hawaii Tribune-Herald*, 356 NLRB 661 (2011), enfd. sub.nom.; *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795 (2009), incorporated by reference, 355 NLRB 1280 (2010), enfd. mem. 452 F. App'x 374 (4th Cir. 2011).

Rules placing bans on photography or recordings, or banning the use or possession of personal cameras or recording devices at the workplace are in most situations unlawfully overbroad where they prohibit the taking of pictures or recordings on non-work time or in non-work areas. Even in situations in which there is an overriding employer interest present, any restrictions on these Section 7 rights must be narrowly drawn so as to protect competing rights and interests. *See* e.g., *T-Mobile USA, Inc.,* 363 NLRB No. 171 slip at 4-5 (2016) (prohibition against recordings unlawfully overbroad where rule failed to distinguish between recordings protected by Section 7 and included within its scope, recordings created during non-work time and in non-work areas); *Whole Foods Market, Inc.*, 363 NLRB No. 87 slip at 4 (2015) (employer's broad and unqualified language prohibiting work-place recordings would reasonably be read by employees as prohibiting Section 7 activity).

As the Board explained in the decisions cited above, employees taking photographs and audio and video recording in the workplace are protected by Section 7 if the employees are acting in concert for their mutual aid and protection. *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 slip op at 49 (2015). Such protected conduct includes recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment related actions.

BMW's rule totally prohibits the use of personal cameras, video and/or audio recording devices within BMW facilities without management approval. The policy is not limited in scope with respect to personal recording devices, but rather, absolutely prohibits the use of such devices at any time within Company facilities. The language of the policy does not make any

exceptions with respect to the use of personal recording devices. Nor does it differentiate between work time and work areas, and non-work time and non-work areas; nor does it draw a distinction in what can be photographed. Therefore, the rule chills employees who wish to exercise their Section 7 rights and violates Section 8(a)(1) of the Act. *Whole Foods Market*, supra, citing *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op at 5 (2014). BMW's rule is unlawfully over broad and insufficiently tailored to protect the Company's legitimate business interests.

Further, the fact that business recording devices may be used to make recordings with **prior management approval** does not make this rule any less unlawful. *See Caesars Entertainment*, 362 NLRB No. 190 slip op at 4 n.10 (2015) (finding camera and recording ban unlawful where rule required employees to obtain permission before using); *Schwan Home Service*, 364 NLRB No. 20 slip op at 4 (2016) (employees cannot be required to obtain permission from the employer to engage in protected concerted activities on their free time and in non-work areas); *American Cast Iron Pipe Co*., 234 NLRB 1126, 1131(1978)(finding unlawful rule requiring employees to obtain permission before distributing union information in non-work areas on non-work time).

At the hearing, BMW attempted to show that it has an overriding proprietary interest associated with the secrecy of its new car designs and features which justified this total ban on recordings and photography anywhere within its facilities at any time. (Tr. 224-229). According to BMW, the only way that it can maintain secrecy of its new car designs and features is to maintain this total ban of recordings within its facilities. *Id.*

The Union submits that this assertion is devoid of merit. BMW's total ban is not narrowly drafted and is much broader than is needed to protect the secrecy of its new car designs and its proprietary information and processes. An example of a rule which is narrowly drawn to protect an employer's interests is the camera and recording rule involved in *Flagstaff Medical Center*, 357 NLRB No. 65 (2011). In that case, the Board majority found lawful a medical center's rule prohibiting employee use of electronic equipment during work time and banning the use of cameras for recording images of patients and/or hospital equipment, property or facilities. 357 NLRB No. 65, slip op at 4-5. Unlike the rule in *Flagstaff*, which expressly prohibited recording images of patients and/or hospital equipment, property or facilities, BMW has a total open ended ban on personal recordings even during non-work time and non-work areas. BMW's ban is much broader than is necessary to protect its alleged proprietary information and processes associated with the secrecy of its automobile designs and features.

In *Caesars Entertainment*, 362 NLRB No. 190 slip 4-5 (2015), the Board overturned an ALJ's finding that the employer's ban on cameras and recording devices was lawful. The Board majority concluded that the Judge erred in so ruling. The Board majority concluded that the employer's rule was "overly broad" and not sufficiently tied to any particularized employer interest.

In the present case, BMW's no recording rule at anytime within its facilities, as written, would prohibit the taking of a photograph in the BMW atrium at the Spartanburg plant. In evidence is a photograph taken of a Union supporter showing his support for the Union, one of the witnesses in this case. *See* G.C. Ex. 6. The area where the photo was taken was just inside the turnstiles where workers enter the BMW plant in the atrium. (Tr. 184).

Under BMW's rule, such a photograph is prohibited; however, there is nothing in the area where this photograph was taken that justifies BMW's photography ban. This photograph in itself is proof positive that BMW's ban on recordings is overly broad and unlawful. There is absolutely no legitimate reason to ban recordings or photographs in areas in which there are not automobiles, equipment or machinery.

According to the evidence BMW introduced at the hearing there is a significant interest in obtaining photographs of new vehicle models prior to their release and it is important to BMW's marketing strategy to protect information concerning its new car designs and features prior to their release date. (Tr. 224-229). The evidence shows that while BMW normally permits plant tours of its facilities, such tours are suspended during the manufacture of new vehicles which have not yet been released. (Tr. 238-239). Moreover, BMW prohibits outside visitors and/or subcontractors from recording and/or photographing within its facility without BMW's permission. (Tr. 242-243). BMW also presented evidence to show that it covers new models when they are driven outside the BMW plant so there is no disclosure to the public of the new models' design and features. (Tr. 231). At the hearing, BMW argued that it's no recording rule within its facility is necessary to protect its valid business interest in avoiding the premature release of its new models' designs and features. (Tr. 225-231).

The Union submits that BMW has made no showing that there is a need for its no-recording ban after the new car models are released and before its new models are being manufactured. BMW permits plant visits during this time. (Tr. 238-239). No reason was presented by BMW for banning recordings and photography in its facilities at and during the times in which it is permitting public tours of the plant and when it permits the public to view its manufacturing process, equipment and vehicles. Just because it bans recordings and

photography by the public during these tours does not aid BMW in the defense of its "no recording" rule for its workers. By permitting access to the public, BMW is permitting the public to see and observe its automobiles, manufacturing equipment, and processes. There is no reason that during the period when plant visits are permitted that BMW should ban its workers' protected activity associated with recordings to aid them in their union organizing efforts and/or the preservation of evidence relating to unfair labor practices or other protected concerted activity associated with recordings or photography.

The evidence also shows that BMW permits drawings and other similar items relating to its unreleased new models to be kept in mixed use areas of its plant where BMW workers take their breaks and gather before the start of work. (Tr. 239). No reason was shown why BMW cannot do what Boeing does and keep information relating to its new models behind closed doors with heightened security instead of in mixed use areas where BMW workers gather before work and take their breaks.

Moreover, BMW has a total ban on recordings and photography with personal cameras or recording devices. This ban is not limited to the subject of the recording or the photography or the area where such activity can take place. As discussed above, in the *Flagstaff Medical Center* case there was a ban on "recording images of patients and/or hospital equipment, property or facilities. BMW could have adopted a rule which was aimed at prohibiting the recording or photography of anything associated with new car design and new car features. There is a total ban here and there has been no attempt to accommodate its workers' Section 7 protected rights. Therefore, BMW's ban on recording within its facilities is overly broad and far exceeds any legitimate business need that it has to protect its new car designs and features prior to release.

Under the *Boeing* balancing test, there is no question that BMW has a legitimate reason for protecting its new car designs and features; however, its total ban on recordings on its premises far exceeds what is necessary to protect this interest. Indeed, there is no need for such a restriction in non-production areas of the plant. BMW should keep its drawings and diagrams of its new cars in secure areas and not in mixed use locations. The rule as drafted far exceeds any legitimate needs of BMW. This rule therefore unduly interferes with the BMW workers' Section 7 rights.

Moreover, contrary to BMW's assertions in its Exceptions Brief, the facts in this case are clearly distinguishable from the facts in *Boeing*. The evidence in *Boeing* clearly established that in that case Boeing had legitimate concerns with regard to protecting top secret and confidential military information. At BMW there is no national security issue present as was and is the case at Boeing. Thus, the need of the utmost security is not present at BMW. At BMW, the employer's need for protection of its new car designs and features can be achieved without a total ban on recordings as the case with Boeing.

At BMW, the total ban on recordings is significantly beyond what is necessary. This employer rule unduly intrudes upon the Section 7 rights of the BMW workers and the Union submits that Judge Dawson was correct in so ruling. (ALJD 24-26). Indeed, the following quotation from Judge Dawson's decision succinctly explains why BMW's no recording rule is unlawful:

> Thus, I have considered and reject Respondent's argument that its substantial interest in protecting its brand and confidential and proprietary information justifies its rule and outweighs its employees' Section 7 rights. In order for an employer's business interests to outweigh employees' Section 7 rights, the rule must be "narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition." *See*

T-Mobile, where the Board stated, "[t]hat the Respondent's proffered intent is not aimed at restricting Section 7 activity does not cure the rule's overbreadth, as neither the rule nor the proffered justifications are narrowly tailor to protect legitimate employer interest or to reasonably exclude Section 7 activity from the reach of the prohibition." Id. . . . . .

I have considered all of the Respondent's evidence and arguments in support of its special circumstances and justification for its rules, but find they are insufficient to justify the overly broad recording rules in this case. Accordingly, these rules would reasonably be construed to interfere with and chill employees in the exercise of their Section 7 rights such that they violate Section 8(a)(1) of the Act.

(ALJD 26).

The Union submits that this analysis is correct and should be upheld by the Board.

F. BMW's Confidentiality Rule Unlawfully Restricts Section 7 Activity

Since January 8, 2016[4], BMW has maintained the following rule:

Confidentiality of Information

Because of the highly competitive nature of the automotive industry, the protection of confidential business information and trade secrets is vital to the interests and success of BMW MC. Such information includes but is not limited to personal and financial information, customer lists, production processes and product research and development.

All BMW MC Associates, suppliers, contractors and third-party vendors must:

- Respect the nature of privileged or confidential information.
- Not use confidential information for personal gain.
- Not share such information with persons internal or external to BMW.

Any information that BMW MC has not released to the general public must be treated as confidential. If an associate has a question about whether certain information should remain confidential, he/she should discuss it with his/her supervisor or a manager.

Violation of these guidelines may result in corrective action up to and including termination of employment.

This rule specifically prohibits BMW employees from disclosing "personal and financial information" to others. It also states that any information that BMW has not released to the general public must be treated as "confidential".

[4] *See* Complaint par. 6(a) and BMW's Answer, G.C. ex. 1 (g) p. 7.

This rule prohibits BMW workers from providing or sharing with others "personal" and "financial" information concerning themselves or their co-workers, such as information as to their addresses, telephone numbers, wages, work schedules, hours and location of work. BMW's rule is open ended with the specific prohibition that any information that BMW has not released to the general public must be treated as "confidential."Significantly, the penalty for violation of this rule can be termination.

Both BMW management representatives who were questioned about this rule at the hearing admitted that the part of the rule referencing "personal" information applied to information relating to the workers. (Tr. 277, 278, 344). Steve Wilson, who is BMW's Media Communications Specialist, stated on cross examination that this rule would prohibit a BMW employee's address from being given to a third party unless that employee had given authorization for the release of his or her address. (Tr. 278).

It is the Charging Party's position that Administrative Law Judge Dawson was correct in finding that this confidentiality rule is unlawful (ALJD 28). While she applied a pre-*Boeing* analysis, it is submitted that this rule falls under *Boeing* Category 3, inasmuch as its adverse impact on NLRA-protected rights is not outweighed by any justification. This confidentiality rule prohibits Section 7 activities by banning BMW employees' discussions of their wages, hours, and working conditions with other BMW workers, unions, or other individuals.

The Board in *Boeing* concluded that comparable rules have the predictive effect of limiting Section 7 discussions of wages, hours and working conditions. *See Boeing*, 365 NLRB No. 164 slip op at 4 (stating that an "example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.").

Under *Boeing*, the rule's legality is dependent upon whether or not its adverse impact upon NLRA-protected rights is outweighed by Respondent's justifications associated with the rule. *See Boeing supra,* at 16. At the hearing, BMW presented evidence relating to its interest in maintaining

the privacy of its new car designs and features. While BMW's concerns about its new car designs and features may present an arguably sufficient justification for parts of its confidentiality rule, these concerns present no justification for BMW's prohibition on the disclose of personnel and employee information which is clearly encompassed in the part of the rule which prevents employees from disclosing to others "internal or external to BMW" "personal information". This prohibition clearly prohibits BMW workers from discussing with others internal or external to BMW, such Section 7 protected topics as their wages, hours, and working conditions. This rule also prohibits workers from providing to the Union their co-workers' phone numbers and addresses.

It is firmly established that the Act protects the right of employees to discuss the terms and conditions of their employment "with other employees. . . and with nonemployees." *Cintas v. NLRB*, 482 F. 3d 463, 466 (D.C. Cir. 2007). Consequently, workplace rules that tend to restrict such activity -- such as restraints on disclosing wages and other employee benefits to non-employees or discussing them with other employees -- are unlawful. *Cintas*, 482 F. 3d at 468-469 (employer's rule which prohibited disclosure of "any information concerning" its employees) is unlawful. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, 2014 WL3778347 at 2-3 (2014) (rule which prohibited discussion of information and disclosure of information about other employees such as wages and other terms and conditions of employment interferes with Section 7 rights).

Likewise, Section 7 protects an employee's disclosure of personal information, such as co-workers' names and contact information to a union in order to assist its organizing efforts, as well as the sharing of such information with other employees, which may be crucial to self-organization where employees act concertedly without union involvement. *See Ridgel Mfg. Co.*, 207 NLRB 193, 196-197 (1972)(Act protects employee's right to obtain names of fellow employees on time cards). Accordingly, restrictions on the communication of personal information such as employee's names, addresses, and similar information are unlawful because they inhibit employees from engaging in conduct protected by Section 7. *HTH Corp.*, 356 NLRB No. 182, slip op. at 42 (2011) (explaining

that employer could not lawfully require that the names and addresses of fellow employees, as opposed to those of hotel guests, be held confidential); *Albertson's*, 351 NLRB 254, 266 (2007) (finding rule unlawful because it prohibited employee from providing work schedules, which included employee names, to the union).

The Board has consistently found such broad open-ended confidentiality rules as BMW has to be unlawful. *See Direct TV U.S.*, 362 NLRB No. 48 slip op. at 2 (2015)(rule prohibiting disclosure of information about . . . . employees [and] employee records overly broad and unlawful); *Caesars Entertainment*, 362 NLRB No. 190, slip op at 1-3 (2015) (rule stating all employees are prohibited from disclosing to anyone outside of the Company . . . any information about the Company which has not been shared by the Company with the general public including organizational charts, salary structures, policy and procedure manuals unlawful); *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3 (1988) (a confidentiality rule that broadly encompasses "employee" or personnel information without further clarification restricts Section 7 protected communications and is unlawful). *Flex-Frac Logistics, LLC*, 358 NLRB No. 127, slip op at 1 (2012) (finding unlawful a rule that prohibited disclosure of "confidential information", including "personnel information and documents " to persons outside the organization); *Hyundai American Shipping Agency Inc.*, 357 NLRB No. 80 slip op at 12 (2011) (finding unlawful a rule that prohibited "[a]ny unauthorized disclosure from an employee's personnel file); *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015 (2001) (finding rule unlawful which stated all information about employees is strictly confidential).

In *Verizon Wireless*, a February 2017 decision pre-dating *Boeing*, the employer's "Employee Privacy" provision of its Code of Conduct requiring employees to protect all personal employee information acquired and retained by the employer, including social security numbers, identification numbers, passwords, financial information and residential telephone numbers and addresses, and prohibiting employees from accessing, obtaining or disclosing another employee's personal

information to people outside of the company, was found unlawful under *Lutheran Heritage* by the majority, and was specifically addressed by former-Member Miscimarra in his dissent. *See Cellco Partnership d/b/a/ Verizon Wireless*, 365 NLRB No. 38, slip op. at 5 (2017) (Miscimarra, P., dissenting). Using his formerly proposed standard set forth in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7-24 (2016), substantially similar to the recently-announced *Boeing* standard, Miscimarra argued that Respondent had a substantial business interest in safeguarding employee information, including social security numbers, identification numbers, passwords, and financial information. *See id.* However, Miscimarra also explained that employees have the NLRA-protected right to "share certain types of information regarding their coworkers when they engage in concerted activity for mutual aid or protection," and that the provision at issue "leaves employees free to share this type of information provided that the information has not be obtained from Verizon Wireless." *Id.* Miscimarra argued that the provision at issue in that case restricted only the disclosure of employee information acquired and retained by the employer. *See id.*

In contrast, in *MCPC, Inc.*, Miscimarra agreed that the employer's rule restricting employees from disseminating "personal or financial information" was unlawful because it would prohibit "protected employee discussions regarding compensation without other important justification." 360 NLRB 216, 216 n. 4 (2014). Miscimarra similarly concurred with the majority's finding in *Schwan's Home Service, Inc.* that the portion of the employer's rule prohibiting disclosure of information concerning employees was unlawful. *See* 364 NLRB No. 20, slip op. at 10 (2016) (Miscimarra, P., dissenting).

The confidentiality rule at issue here is far more closely aligned with those rules in *MCPC, Inc.* and *Schwan's*, vaguely prohibiting the disclose of "personal information", that that in *Verizon Wireless*. Here, BMW's confidentiality rule lacks the specificity of the *Verizon Wireless* rule regarding the personal information it prohibits from disclosure, and leaves under its vague umbrella of prohibition those NLRA-protected topics of discussion and information sharing among employees,

as contemplated by Miscimarra in *Verizon Wireless*. See *Verizon Wireless, supra*. 365 at 5 (Miscimarra, P., dissenting). Miscimarra noted that employers have a strong business justification argument for prohibiting the disclosure of personal employee information like social security numbers, identification numbers, and passwords in order to protect them from fraud and identity theft; however, when rules do not leave employees free to share information about their co-workers when engaged in concerted activity for mutual aid and protection, the justification falls short. *See id.* The BMW rule here therefore unlawfully prohibits protected discussion related to employees' terms and conditions of employment.

At the hearing, BMW attempted to distance itself from its Answer to the Complaint wherein it specified the exact language of this rule. (Tr. 322-324). It moved to amend its Answer to deny this allegation; however, that motion was denied by Judge Dawson. (Tr. 324). The Union absolutely agrees with this ruling by the Administrative Law Judge because it was made at a time in which this hearing was almost at the conclusion. To have granted that motion would have unduly prejudiced the Counsel for the General Counsel and the Union.

BMW is now asserting that its confidentiality rule is more detailed than it appears in its Answer and the confidentiality rule as it appears in Respondent's Exhibit 10 contains the following statement: If additional information is needed the entire policy can be viewed on the BMW Intranet.

The Union submits that BMW is bound by its Answer to the Complaint and cannot and should not be permitted to vary from its Answer. Even assuming *arguendo* that BMW can abandon its Answer and assert that its confidentiality rule is broader than stated in its Answer to the Complaint the Union submits that this position does not enable BMW to validate its confidentiality rule.

BMW Exhibit 9 is the confidentiality rule as it appears on the BMW Intranet. That document does not in any way clear up the vagueness of the BMW confidentiality rule as it appears in the Associate Guidebook. Indeed, if anything, it adds to the uncertainty. In the Intranet rule, there is an explanation as to what is "strictly confidential information and data." Significantly, in the Associate

Guidebook the confidentiality rule deals with "confidential business information." The term "strictly confidential information" is not used in the Guidebook given to the workers. In short, the Intranet rule only adds to the confusion as to what is intended to be covered by BMW's confidentiality rule.

It is well established that such ambiguity is construed against the Employer as the drafter of the work rule; for employees should not have to decide at their peril what activities a rule prohibits. *See Schwans Home Service, Inc.*, 364 NLRB No. 20 slip op, p. 1-3 (2016). Faced with this ambiguity, and fearing potential discipline, employees would reasonably err on the side of caution and refrain from exercising their Section 7 right to share workplace information. *Id.*

UAW submits that BMW's confidentiality rule prohibits the disclosure of information which a worker has a Section 7 right to share with others. While BMW has a legitimate interest in protecting its new car designs and features, it has no legitimate interest in preventing its workers from discussing among themselves and with others their wages, hours, and working conditions. This rule unduly intrudes on its workers' Section 7 rights. Accordingly, BMW's confidentiality rule is overly broad and unlawful. The Union submits that Judge Dawson's decision finding that this rule is unlawful should be upheld by the Board. (ALJD 28).

G. BMW's Solicitation Rule Is Facially Invalid

It is undisputed that BMW has in place the following solicitation and distribution rule[5]:

> **Solicitation and Distribution**
>
> BMW MC prohibits the solicitation, distribution and posting of materials on or at Company premises by any Associate or non-Associate, except as may be permitted by this policy. Associates may not solicit other Associates to join or contribute to any fund, organization, cause, activity or sale during work time and/or in work areas. Work time is that time when Associates are expected to be working and does not include rest, meal, or other authorized breaks. Associates may not distribute literature, including circulars or any other materials, during work time and in any work areas. The posting of materials is only permitted with joint approval by the departments of Associate Relations and Corporate Communications. BMW MC permits appeals for United Way. Human Resources must approve any exceptions to

[5] *See* Complaint par. 7 and Answer.

this policy. Solicitation or the distribution of literature or any circulars or material by non-Associates on BMW MC premises is prohibited.

This rule regulates both solicitation and distribution. With respect to solicitation, it is the Union's position that this solicitation rule as Judge Dawson found reasonably tends to chill employees from engaging in protected solicitation on non-working time in work areas and is unlawful. (ALJD 29-30). The rule states that the Company "prohibits …solicitation . . . during work time and/or in work areas," conveying to employees the message that if either condition exists, they cannot engage in union solicitation. Under settled law, employers may ban solicitation in working areas during working time, but may not extend such bans to working areas during non-working time. See *Restaurant Corporation of America v. NLRB*, 827 F. 2d 799, 806 (D.C. Cir. 1987).

Here, the Company's rule extends the ban to work areas during non-work time, precisely as the law forbids. *See Food Servs. of Am., Inc.*, 360 NLRB No. 123, 2014 WL 2448456 (2014) (finding unlawful work rule prohibiting solicitation "during working time or in work areas"); *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2012) (finding unlawful work rule which stated employees may not solicit or distribute literature during work time or in work areas).

The Company apparently contends that the rule as written never actually interfered with protected solicitation because employees have been permitted to talk about anything they desire while at work and, therefore, there is no problem with its solicitation rule. This argument is legally flawed.[6] (Tr. 67-70; 98-100).

[6] BMW also contended that it gave lawful instructions to Willie Pearson when he made an intranet inquiry concerning his rights and any ambiguity in BMW rules was cleared up by what BMW advised Pearson. *See* Res. Ex. 11. BMW did not distribute this email to its workforce so even if it may have given proper instructions to Pearson, it did not share this information with its entire workforce. Thus, Res. Ex. 11 does not assist BMW herein. *See Cast-Matic Corp.*, NLRB 1349, 1350 fn. 6 (2007).

Under established Board law, "the actual practice of employees is not determinative" of the question whether the Company maintained an unlawfully overbroad written rule. *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000); *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014).

It is entirely appropriate for the Administrative Law Judge and the Board to "focus on the text" of the rule in question. There is no need for the Administrative Law Judge or the Board to "rely on evidence of employee interpretation in order to determine that the Company's rule violates Section 8(a)(1) of the Act. *Id*.; *accord Flex Frac Logistics*, 746 F.3d at 209 (affirming Board's finding of Section 8(a)(1) violation and rejecting employer argument that employees did not actually interpret rule as restricting Section 7 rights).

Nor is it necessary, as the Company may suggest, for the General Counsel to show actual enforcement of the rule or actual interference with protected solicitation. As a matter of law, an employer may violate the Act by merely maintaining a rule that reasonably tends to chill protected activity. *See Grandview Health Care Ctr.*, 332 NLRB 347, 349 (2000) ("it is axiomatic that merely maintaining an overly broad rule violates the Act"); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (finding that where employer rules "are likely to have a chilling effect" on Section 7 activity, the Board "may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement"). Indeed, the Board held in *Boeing* that is may find a violation of Section 8(a)(1) based on the maintenance of rules that could reasonably be construed to prohibit protected activity, even where those rules are not enforced. *See Boeing, supra*, 365 NLRB at 15-16.

Evidence of actual enforcement or interference is not necessary or relevant to the finding of the unfair labor practice here, which is predicated on the reasonable tendency to chill union

solicitation on non-working times in work areas. *See Cintas Corp.*482 F.3d at 467 (finding evidence of actual enforcement not required to support Board's conclusion that employer rule was overly broad and thus unlawful); *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (observing that "the finding of a violation is not premised on . . . evidence of enforcement"), *enforced*, 987 F.2d 1376 (8th Cir. 1993). *See also Northeaster Land Servs*., 645 F.3d 475, 481 (1st Cir. 2011) (finding employer rule unlawful even though never applied to restrict Section 7 activity); *Brockton Hosp.*, 333 NLRB 1367, 1377 (2001) (same), *enforced in relevant part*, 294 F.3d 100 (D.C. Cir. 2002).

With regard to employer maintenance of rules, it is well established that an employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

a. The nature and extent of the potential impact on NLRA rights by prohibiting employees from soliciting in work areas.

Under the standard articulated in *The Boeing Company* the nature and extent of the potential impact of the Respondent's rule or policy on NLRA Section 7 rights must first be determined. As mentioned above, the record establishes that the Respondent maintains a Solicitation and Distribution Policy that prohibits employees from soliciting or distributing material in working areas during non-work time. Unquestionably, the potential impact of such a ban is extensive, as it would prevent and prohibit employees who are off duty and not on working time from engaging in solicitation, and it would therefore interfere with employees' attempts to engage in union and protected concerted activities. Such a prohibition would

certainly strike at the heart of employees' rights under Section 7 of the Act. In fact, its effect and impact would be inimical to one of the most fundamental precepts of the Act -- the right to form, join, or assist labor organizations.

In *Republic Aviation*, 324 U.S. 793 (1945), the U.S. Supreme Court upheld the Board's ruling that an employer's policy prohibiting solicitation in the facility at any time "entirely deprived [employees] of their normal right to 'full freedom of association' in the plant on their time, the very time and place uniquely appropriate and almost solely available to them there for." 324 U.S. at 801 fn.6 (internal quotation marks omitted). In that case, the Court recognized that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." Id. at 803 fn. 10. Rules prohibiting solicitation "outside of working hours, although on company property, " the Court held, is therefore presumptively unlawful absent "special circumstances [that] make the rule necessary in order to maintain p production or discipline." Id. at 803-804 fn. 10 (quoting *Peyton Packing Co., Inc.*, 49 NLRB 828, 843-844 (1943)). Thus, the Board has held with U.S. Supreme Court approval, that restrictions on employee solicitation during non-working time, and on distribution during non-working time in non-working areas, are violative of Section 8(a)(1) unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline. *Beth Israel Hospital*, supra at 492-493.

b. The purported justification associated with the rule

Judge Dawson found that there was "no legitimate business reason". . . for maintaining the rule as it reads." (ALJD p. 30). It is submitted that this finding is supported by the record evidence. Indeed, while the Employer attempts to defend the rule based on alleged lack of

enforcement, it completely failed to explain why this rule was needed in the first place. This is an automobile assembly plant and there is no legitimate or justifiable basis for prohibiting workers from engaging in solicitations in work areas during non-work time. This rule as written seriously intrudes upon BMW workers' Section 7 rights.

Under the Board's new analysis set forth in *The Boeing Company*, *supra*, BMW's solicitation rule is properly categorized as a Category 3 rule that is unlawful to maintain because it prohibits or limits employees' Section 7 protected conduct, and the adverse impact on such rights is not outweighed by the alleged justifications associated with the rule. 365 NLRB No. 154, slip op. at 2-3. Accordingly, it is submitted that the Board should uphold Judge Dawson's finding that BMW's solicitation and distribution policy "violates Section 8(a)(1) of the Act." (ALJD 30).

CONCLUSION

Based on the foregoing and the entire record evidence, it is submitted that BMW as alleged in the Complaint and as found by Judge Dawson has violated Section 8(a)(1) of the Act. Charging Party asks the Board to so hold and grant the relief as specified in Judge Dawson's Decision.

This 9th day of March, 2018.

Stanford, Fagan LLC

By: s/ James D. Fagan, Jr.
James D. Fagan, Jr.
Attorney for International
Union UAW

2540 Lakewood Ave.
Atlanta, GA 30315
404-897-1000
jfagan@sfglawyers.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BMW MANUFACTURING CO.

and **Case 10-CA-178112**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

CERTIFICATE OF SERVICE

I, James D. Fagan, Jr., attorney for International Union UAW, Charging Party hereby certify that I have emailed a copy of the foregoing Brief to:

John D. Doyle
Regional Director
NLRB Region Ten

Kiersten Meyers
Attorney, NLRB Region Ten
kierstein.meyers@nlrb.gov

D. Christopher Lauderdale
Emily K. O'Brian
lauderdale@jacksonlewis.com
emily.obrian@jacksonlewis.com

This 9th day of March, 2018

By: s/ James D. Fagan, Jr.
James D. Fagan, Jr.
Attorney for International Union UAW

2540 Lakewood Ave.
Atlanta, GA 30315
404-897-1000
jfagan@sfglawyers.com